IN THE

SUPREME COURT OF THE UNITED STATES

~~78-835~~

OCTOBER TERM, 1978

No. A-330

UNITED STATES OF AMERICA,
Respondent,

vs.

JAMES A. SAETTELE,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals
for the Eighth Circuit

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Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Cricuit entered in this cause on September 13, 1978. That Court denied Petitioner's Petition for Rehearing on October 2, 1978.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, but is appended hereto as Appendix A. The order denying a rehearing is also appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 1978; the Petition for Rehearing was denied on October 2, 1978. On October 11, 1978, this Court entered an order extending the time for filing this Petition to December 1, 1978. This order is appended hereto as Appendix C. Jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code.

QUESTIONS PRESENTED

1. Were petitioner's rights under the Compulsory Process clause of the Sixth Amendment and the Due Process clause of the Fifth Amendment to the United States Constitution violated when the District Court refused to order the Government to grant immunity to essential defense witnesses when the Government's chief witness was testifying under a grant of immunity?

2. Did the Government's refusal to grant immunity to essential defense witnesses amount to a withholding of evidence favorable to the defendant in violation of the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963) and the Due Process clause of the Fifth Amendment?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 18 United States Code, Section 6001, 84 Stat. 926; Section 6002, 84 Stat. 927; Section 6003, 84 Stat. 927, as well as Amendment V and Amendment VI to the United States Constitution are involved in this case. These provisions are set forth in Appendix D hereto.

STATEMENT

A. Conviction and Sentence

This petition is for review of the judgment and sentence of the United States District Court for the Eastern District of Missouri, Honorable John F. Nangle.

Petitioner was convicted of one count of conspiracy to violate Section 2315, Title 18 United States Code in violation of Section 341, Title 18 United States Code and one count of receiving and selling merchandise stolen from interstate commerce, in violation of Section 2315, Title 18 United States Code. Petitioner was sentenced to three years imprisonment on each count, the sentences to run concurrently.

The United States Court of Appeals for the Eighth Circuit affirmed the convictions in a split-decision, over a lengthy dissent by Circuit Judge Bright. Rehearing was denied.

B. Summary of the Record

Petitioner's convictions grew out of the theft of about 202 pieces of jewelry from one Michael Hughes on February 5, 1976, in Miami, Florida. The jewelry consisted of 197 "odd pieces" and five pieces of considerable value which allegedly belonged to Tsarina Alexandra of Russia.

The Government's case depended almost exclusively on the testimony of Joseph McGirr, an alleged co-conspirator, for whom the Government sought and obtained a grant of immunity. According to McGirr's testimony, he, Thomas Sargis and Russell Briddle had stolen the jewelry by burglarizing Hughes's apartment. McGirr, Sargis and Briddle subsequently transported the jewelry to St. Louis, Missouri and attempted to dispose of it.

In connection with these efforts, a friend of Sargis's, Marshall Chappel, brought Petitioner, a jeweler, to Sargis's house to view the jewelry. Petitioner was informed at this point that the jewelry was the collection of a retiring jewler who wished to sell it. Petitioner expressed interest in purchasing the jewelry but did not have the money.

The men had a second meeting several days later at which time, Petitioner contended, he became suspicious of the transaction but was threatened by McGirr and Sargis with physical harm to himself, his wife and his children if he refused to cooperate by selling the jewelry. McGirr, however, denied that Petitioner was threatened. In any event, Petitioner tendered $4,000.00 in cash, two automobile titles and a diamond ring to McGirr and received a portion of the jewelry. Later arrangements were made whereby Petitioner paid Sargis and McGirr $10,000.00 and was given all of the "odd pieces" with the understanding that he would pay an additional $40,000.00 for them as he sold them. After McGirr and Sargis received the $50,000.00 Petitioner would then have access to the "Russian pieces". Petitioner subsequently returned the jewelry to Sargis.

Sargis was arrested with the jewelry in St. Louis on June 1, 1976, after McGirr, who had been arrested in Florida on a parole violation, became a government informant.

Supbsequent to these events, McGirr, the self-acknowledged ringleader of the conspiracy, was granted immunity from prosecution in return for his testimony. Sargis was indicted for conspiracy to transport stolen merchandise in interstate commerce and for the substantive offense of transporting stolen merchandise in interstate commerce. He pleaded guilty to the conspiracy count and the Government dismissed the substantive count. Chappel has never been indicted.

Petitioner was interviewed by the FBI and was asked if he knew Sargis, McGirr or Chappel. He admitted knowing Chappel,

but denied knowing McGirr or Sargis whom he knew by aliases. Petitioner was subsequently subpoenaed to testify before a federal Grand Jury, but under threats from Sargis and McGirr, elected to take the fifth amendment.

The evidence indicated that Petitioner was offered immunity from prosecution prior to his Grand Jury appearance. He advised his attorney, however, that he could not accept immunity if it involved testifying against McGirr and Sargis because he feared he or his family would be killed if he so testified. Therefore, he declined the offer of immunity and it was not conferred upon him. He was subsequently indicted and prosecuted.

Submitting his defense on the grounds of coercion and duress, Petitioner called Sargis and Marshall Chappel as witnesses. Both men had been summoned to court as potential Government witnesses, Chappel by subpoena, and Sargis by Writ of Habeas Corpus Ad Testificandum. Although the Government discussed a grant of immunity with their attorney, the Government elected not to use them and no immunity was granted. However when called by the defense both witnesses refused to testify on Fifth Amendment grounds.

Thereupon, counsel for Petitioner moved to compel testimony of each witness and asked the court to grant them immunity, or alternatively, to compel the Government to seek immunity pursuant to Section 6001 et seq. 18 United States Code. Alternatively, defense counsel asked the Government to grant Chappel and Sargis letters of non-prosecution. Despite the fact that the Government had no intent to prosecute either Sargis or Chappel, the government attorney refused to apply for witness immunity pursuant to Section 6003, Title 18 United States Code. He further refused to apply to the United States Attorney for a non-prosecution letter.

In connection with Petitioner's motions to provide immunity to Sargis and Chappel it was stipulated that if Lawrence J. Flem-

ing, an attorney associated with Petitioner's trial counsel, were called to testify, he would testify that he interviewed both Sargis and Chappel and that both told him that Sargis and McGirr had continually threatened bodily harm or death to Saettele if he did not go through with the "fencing" of the jewelry. The Petitioner argued that it was imperative that this exonerative evidence be made available to him through a grant of immunity to the witnesses.

The stipulation of testimony is set out in Appendix E.

The trial court overruled petitioner's motions to provide immunity and held that it did not have inherent power to grant witnesses immunity when the Government refuses to immunize them or to compel the Government to apply for immunity. Petitioner thereupon moved, alternatively, to strike McGirr's testimony or to dismiss the indictment based upon a denial of equal protection and the inherent unfairness of the Government's refusal to grant immunity to defendant's witnesses while immunizing the one witness favorable to the Government's position. These motions were denied.

Testifying in his own defense, Petitioner stated that Marshall Chappel first contacted him about the jewelry. Chappel introduced him to Sargis who told him the jewelry came from a retiring jeweler who wanted to sell his collections. Several days later there was another meeting at which he met McGirr. He testified that at this point he did not know the jewelry was stolen, but he became aware that something was wrong when he heard McGirr ask Sargis how much Petitioner knew.

Petitioner testified that he started to leave the meeting, but that McGirr informed him the jewelry was "hot" and that he, Petitioner, was involved whether or not he wanted to be involved. He further testified that both Sargis and McGirr were armed. At this point, McGirr threatened to kill Petitioner and his family if he went to the police or told anyone that the

jewelry was stolen. McGirr then directed Petitioner on how to pay for the jewelry. Petitioner testified that he was terrified of McGirr and Sargis and feared for his life and the lives of his wife and children, and that it was out of fear that he cooperated in attempting to fence the jewelry.

Upon this record, the court found defendant guilty as charged on both counts of the indictments. Probation was denied and defendant was sentenced to three years custody on each count, the sentences to run concurrently.

The Court of Appeals, over the vigorous dissent of Judge Bright, affirmed the conviction.

REASONS FOR GRANTING THE WRIT

I

This Case Raises an Important Question of Federal Law Which Has Not Been Considered Previously by This Court, to Wit: Whether the Due Process Clause and the Compulsory Process Clause Require That Essential Defense Witnesses Be Granted Immunity Under 18 U.S.C. § 6001 Et Seq., When the Government So Immunizes Its Chief Witness.

This case raises an important question concerning the right of a criminal defendant to compulsory process of witnesses in his defense and the competing privilege of those witnesses against self-incrimination, as well as the Government's rights and duties under the Federal immunity statutes, 18 U.S.C. § 6001, et seq. This case also raises the question of whether the Government's refusal to seek immunity for essential defense witnesses may amount to withholding of exculpatory evidence which was condemned in *Brady v. Maryland*, 373 U.S. 83 (1963) as a violation of the due process clause of the Fifth Amendment. This latter issue is treated under Section 2, *infra*.

Petitioner testified that after becoming involved in the sale of the jewelry he learned that the jewelry was stolen. At this point, Petitioner attempted to extricate himself from the situation, but according to his testimony, both McGirr and Sargis threatened physical harm to him and his family unless he continued to try to sell the jewelry. Petitioner admitted selling some of the jewelry, but returned the bulk of it to Sargis.

Petitioner testified that the threats from Sargis and McGirr were continual after the scheme had come undone. When Petitioner was subpoenaed before a Federal Grand Jury, he was again threatened by McGirr and Sargis and directed by them to plead the Fifth Amendment.

During the investigation of this matter and prior to Sargis' plea of guilty, Petitioner was advised by the Government's attorneys that they knew of his involvement in the scheme. The Government, however, offered to seek immunity for him and informally promised not to prosecute him in return for his testifying against the other participants. Saettele declined this offer because, as he testified at his trial, he was in mortal fear of McGirr and Sargis for himself and his family.

Under the circumstances outlined above, Saettele sought to defend himself by establishing the defense of coercion.

At trial, McGirr denied that he or Sargis had threatened Saettele and his family. With respect to Chappel, it was established that the Government was prepared to either immunize him or grant him a letter of non-prosecution if the Government called him as a witness. Such arrangements were discussed with Chappel's attorney prior to trial. Apparently, however, the Government decided not to call him because it was learned that he would corroborate Saettele on the nature and frequency of the threats made to Saettele by Sargis and McGirr. With respect to Sargis, the Government brought him to court under a writ of habeas corpus ad testificatem, and apparently was prepared to immunize him from further prosecution if he were called as a Government witness, but he also was not called as a Government witness.

It was stipulated that both Sargis and Chappel had been interviewed by defense counsel, and that defense counsel's testimony would be that they told him that Saettele had indeed been threatened repeatedly by McGirr and Sargis and that if they were given immunity, they would so testify. It was further stipulated that the Assistant United States Attorney would testify that Sargis and Chappel told him that no threats were made on Saettele's or his family's lives until Saettele fell behind on his payments for the jewelry that he had on "consignment".

However, immediately prior to trial the Assistant United States Attorney informed defense counsel of statements by Chappel regarding the threats, since he believed the statements were *Brady* material.

After the Government elected not to call either Sargis or Chappel as a witness, the Petitioner called them as witnesses for the defense. Both men, however, refused to testify on Fifth Amendment grounds.

Thereupon, the defense made a series of motions requesting that the court grant Sargis and Chappel immunity under 18 U.S.C. 6001 et seq. or, alternatively that the court compel the Government to either apply for formal immunity or grant a letter of non-prosecution to the witnesses. The court denied these motions. Thereupon, the defense moved to have the court strike McGirr's testimony on Due Process and Equal Protection grounds. The court also denied this motion.

Saettele, as stated above, testified in his own defense, but was unable to supply the trier of fact with any direct evidence corroborating his coercion defense other than his own testimony. He was convicted of both counts charged in the Indictment.

Petitioner submits that the Court of Appeals in this case erroneously concluded that it need not decide whether Saettele was entitled to immunity for his witnesses. The court reached this conclusion because it found that Saettele had not established his duress defense. However, as the lengthy, and scholarly, dissenting opinion by Judge Bright points out, this conclusion is improper because the district court prematurely concluded that the defense of coercion was unavailable to Saettele. (Slip opinion, pp. 11-12).

The Court, in effect, allowed the government to restrict the defense evidence (by withholding immunity) and then determined that the defendant had not produced sufficient evidence to establish the defense of coercion.

As the dissent notes, the district court had no idea what the prospective witnesses' testimony would have been. Therefore, it could not properly have excluded their testimony on the grounds that Saettele was not entitled to the duress defense as a matter of law. The witnesses' testimony may well have indicated such a strong case of duress that the defense would have been established. For example, in light of such evidence, the Court might have concluded that the defendant, under the circumstances, did not have a realistic opportunity to extricate himself from the scheme. The testimony of Chappel and Sargis might well have bolstered Saettele's credibility regarding his state of mind and the terror which he was experiencing. Consequently, the first reason offered by the District Court for denying the defense motions, standing alone, is a violation of the compulsory process clause of the Sixth Amendment. *United States v. Nixon*, 418 U.S. 683, 709 (1974); *Washington v. Texas*, 388 U.S. 14, 23 (1967).

As the dissent notes further, the district court gave two other reasons for denying the motions made by the defense relative to Sargis and Chappel:

1. That a grant of federal immunity would not necessarily protect a witness from state prosecution. (Therefore, the district court concluded, the witnesses might be justified in refusing to testify even if immunity was granted.)

2. That it lacked the power to grant immunity to the witnesses or compel the Government to do so.

The first of these reasons is clearly erroneous. It is well settled that a grant of federal immunity extends to subsequent state as well as federal prosecutions. *Kastigar v. United States*, 406 U.S. 441, 456-59 (1972); *Murphy v. Waterfront Commis-*

sion, 378 U.S. 52, 78-79 (1964); *In re Bianchi*, 542 F. 2d 98 (1st Cir. 1976); *United States v. Watkins*, 505 F. 2d 545 (7th Cir. 1974); *United States v. Armstrong*, 476 F. 2d 313 (5th Cir. 1973).

The final reason given by the district court for denying the defense motions, that it lacked the power to grant immunity or to compel the Government to do so, even when the Government immunized its chief witness, raises a question that Petitioner urges this Court to scrutinize.

Petitioner concedes that under the statutory scheme established by 18 U.S.C. 6001 et seq., and particularly Section 6003, the district court does not have inherent power to grant immunity to witnesses. This power is vested in the United States Attorney and his delegates. *In re Daley*, 549 F. 2d 469 (7th Cir. 1977); *United States v. Allstate Mortgage Corp.*, 507 F. 2d 492 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975). *See also, Earl v. United States*, 361 F. 2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921(1967) (decided under predecessor to 18 U.S.C. 6001 et seq., 18 U.S.C. 1406).

However, Petitioner submits that when the Government immunizes its chief witness, but refuses to grant immunity to two essential defense witnesses (indeed the only other two eyewitnesses), both the due process clause and the compulsory process clause empower and require the district court to compel the Government to grant immunity to the defense witnesses. If the Government refuses to do so, the district court should strike the testimony of the immunized Government witness or dismiss the prosecution. See e.g., *United States v. Morrison*, 535 F. 2d 223, 229 (3d Cir. 1976).

The question is essentially whether or not the Government should be placed in the position of determining which witnesses will testify and which will not by its decision to grant or to withhold immunity depending on whether the witnesses testimony will be favorable to the government.

Petitioner submits that this important question concerning the due process rights and the compulsory process rights of criminal defendants vis-a-vis the Government's power to grant immunity to its own witnesses should be decided by this Court.

Although several Circuit Court cases have discussed this question, only the Third Circuit, in *United States v. Morrison*, 535 F. 2d 223 (3d Cir. 1976), has been faced with a factual situation similar to that in the case at bar.

In *Morrison, supra*, the defendant had a witness who was prepared to exonerate him by taking full responsibility for the crime with which he was charged. However, the prosecutor intimidated the witness to the point where she invoked her Fifth Amendment privilege. The appellate court reversed the defendant's conviction and held that the egregious conduct of the prosecutor had violated his right to due process. Noting that the witness would likely re-invoke the Fifth Amendment on retrial, the court of appeals ordered that upon retrial, the witness be granted immunity. If the Government refused to seek immunity, the district court was ordered to enter a judgment of acquittal.

Other courts have indicated that under circumstances such as exist in the present case, a district court may well have the power to order the Government to grant immunity or the duty to dismiss the prosecution. *See, e.g., United States v. LaDuca*, 447 F. Supp. 779, 786-87 (D.N.J. 1978).

In *Earl v. United States*, 361 F. 2d 531 (D.C.Cir. 1966), *cert. denied*, 388 U.S. 921 (1967), the defendant sought immunity for a witness who pled guilty in an unrelated case, but who received a *nolle prosequi* as to charges arising out of the incident that led to the charges against Earl. The witness refused to testify on Fifth Amendment grounds. The Court held

that the district court did not have inherent power to grant immunity to the defense witness. Unlike the instant case, however, the Government did not use any immunized witnesses in its own case. Judge (now Chief Justice) Burger, writing for the court, noted that the result might well differ had the Government immunized its own witnesses. Judge Burger stated:

> "We might have quite different and more difficult problems had the Government secured testimony from one eyewitness by granting him immunity while refusing to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process." 361 F. 2d at 534, n. 1 (emphasis is original)

The facts of the instant case, of course, present precisely the situation to which the Chief Justice referred in *Earl* as vividly dramatizing a due process argument.

United States v. Allstate Mortgage Corp., 507 F. 2d 492 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975) suggests the same result. Although the court held that a defendant does not have a constitutional right to have immunity conferred upon his witnesses who invoke the Fifth Amendment privilege, it expressly contrasted the case with a situation, such as that in the instant case, in which the Government immunized its own witnesses. *See also, United States v. Ramsay*, 503 F. 2d 524 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975).

In *United States v. Leonard*, 494 F. 2d 955, 985, n. 79 (D.C. Cir. 1974), Chief Judge Bazelon, in a concurring and dissenting opinion, suggested that the trial court could condition the introduction of the Government's evidence on the Government's agreement to seek immunity for defense witnesses. This course of action is based on the trial court's inherent powers necessary to meet its responsibility to provide a fair trial to the

criminal defendant. For an illuminating discussion of this question presented in this case, *see, United States v. Gaither*, 539 F. 2d 753 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 961 (1976) (statement of Bazelon, C. J. upon denial of petition for rehearing *en banc*). *See* also, Westen, *The Compulsory Process Clause*, 73 Mich. L.Rev. 71, 166-70 (1974), and Note, A reexamination of Defense Witness Immunity: A New Use For *Kastigar*, 10 Harv. J. Legis. 75 (1972).

In *United States v. Alessio*, 528 F. 2d 1079 (9th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976), the Court declined to compel the Government to grant immunity to defense witnesses. The Court analyzed the defendant's contention in terms of whether he had received a fair trial. It held that the denial of immunity to the defense witnesses did not violate his due process right to a fair trial because the testimony of the witnesses would have been merely cumulative.

As the dissent in the case at bar notes, however, the testimony of Sargis and Chappel was not cumulative in nature. Rather, they were the only eyewitnesses to the alleged threats, the only witnesses who could have corroborated Saettele's testimony and refuted McGirr's testimony. (Slip opinion, pp. 14-15). Thus, fundamental fairness required that Petitioner have the opportunity to present the crucial testimony of these witnesses. Reversal is required because of the violation of Petitioner's due process right to a fair trial. *Webb v. Texas*, 409 U.S. 95 (1972); *United States v. Morrison, supra.* Moreover, the testimony of these two individuals who were present when the alleged threats were made might well have established the necessary evidence of the reality and immediacy of the threats.

The dissent below, quoting this Court's statement in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), sums up well the paramount interest of society in providing a fair trial:

"The very essence of the due process clause of the fifth amendment, as well as the sixth amendment in its entirety, is the assurance of a fair trial for criminal defendants. The importance of this requirement cannot be overstated, for '[S]ociety wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.' [*Brady v. Maryland*, 373 U.S. 83, 87 (1963)]" (Slip opinion, p. 12)

For the foregoing reasons, Petitioner submits that he was denied a fair trial because of the Government's refusal to immunize his witnesses while it immunized its own chief witness. This Court should provide guidance to the lower courts and Government prosecutors on the due process and compulsory rights limitations on the Government's use of immunized witnesses.

II

Guidance Is Needed From This Court on the Question of When the Government's Refusal to Grant Immunity to Essential Defense Witnesses Amounts to a Suppression of Favorable Evidence in Violation of the Rules Established by Brady v. Maryland, 373 U.S. 83 (1963).

In his dissenting opinion in the court below, Judge Bright analyzed the issues raised by the Government's refusal to seek or grant immunity to Sargis and Chappel by suggesting that the rule established by *Brady v. Maryland*, 373 U.S. 83 (1963), and its predecessor, *Roviaro v. United States*, 353 U.S. 53 (1957) should be extended to the facts of this case.

Brady v. Maryland, supra, of course, held that failure of the prosecutor to disclose evidence favorable to the defendant violates due process of law. In that case, two defendants were separately convicted of first degree murder. The evidence kept from the defense was the co-defendant's extra-judicial statement that he had committed the actual homicide. This evidence was considered by both the Maryland Court of Appeals, and this Court, as exculpatory evidence on the issue of Brady's punishment, although not on the issue of his guilt. Therefore, a new trial was ordered solely on the punishment issue.

In *Roviaro v. United States, supra*, defendant's convictions for illegal transportation and illegal sale of heroin were reversed by this Court because of the trial court's refusal at trial to order disclosure of the identity of an informer who was a primary witness to both the transportation and the sale. Unlike *Brady v. Maryland, supra, Roviaro* was not explicitly decided as a matter of constitutional law. Rather, that decision appears to be an exercise of this Court's supervisory power over lower federal courts.

While both these cases are factually distinguishable from the case at bar, both hold that the basic inquiry in a case in which a defendant claims that the Government has kept evidence from him is whether, despite the governmental action complained of, the defendant received a fair trial.

Notably, the informer in *Roviaro* whose identity was sought may well not have had any evidence favorable to the defendant. In contrast, in this case, there was an affirmative showing by the defense that the testimony of Sargis and Chappel would be favorable to Saettele's defense. In fact the record reflects that the Assistant United States Attorney informed defense counsel of Chappel's statement regarding the threats to petitioner because he felt they were *Brady* material. Ironically, however he also assumed that the statements could not be utilized by the defense when he refused to seek immunity for Chappel.

In this case, it should also be noted that the Government presented no affirmative reason for refusing immunity to these

witnesses. (See Slip opinion, p. 15). The Government was not relying on the informer privilege as it was in *Roviaro v. United States, supra.* Indeed, the situation is much closer to that of *Brady v. Maryland, supra,* in that it was clear that the witnesses' testimony would corroborate Saettele's testimony and rebut McGirr's on the nature and extent of the threats made against Saettele (Slip opinion, p. 15).

Judge Bright's position in this case is supported by Judge Bazelon's cogent analysis of this issue in *United States v. Leonard, supra,* 494 F. 2d 955, 985, n. 79 (D.C. Cir. 1974) (Bazelon, C.J. concurring in part and dissenting in part). In *Leonard,* Judge Bazelon observed that the immunity procedures established by 18 U.S.C. § 6003 are not limited by its terms to Government witnesses. Rather, immunity is to be granted when ". . . the testimony or other information from such individual may be necessary to the public interest", 18 U.S.C. § 6003(b)(1). Judge Bazelon noted that the public interest in the reliability of verdicts is forwarded as much by testimony in favor of the defendant as by testimony in favor of the Government's position. Judge Bazelon further noted that grants of immunity to defense witnesses appear to be necessary under the rule established by *Brady v. Maryland, supra.*

The Government cannot be heard to argue that it would necessarily lose something if it granted "use" immunity to Petitioner's witnesses. As Judge Bright points out in his dissent, the Government loses nothing in granting immunity to defense witnesses because the statements of the witnesses, which may be incriminating to them and which cannot be used against them, would never have been made in the absence of the immunity grant. (Slip opinion, p. 15, *citing,* Westen, *The Compulsory Process Clause,* 73 Mich. L. Rev. 71, 169 (1974)).

However, it is clear that the Government refused to grant immunity to Petitioner's witnesses, not because it wished to

prosecute them, but because it feared that their testimony would damage its case.[1]

Petitioner submits that under the circumstances of this case the Government's action in denying immunity to his witnesses was a violation of his due process rights as established by *Brady v. Maryland, supra,* 373 U.S. 83 (1963). The obvious unfairness of the Government's being able, by fiat, to determine whether the defendant will have access to admittedly favorable evidence, through the withholding of its power to seek immunity should not be permitted by this Court. Guidelines for the use of immunity in such situations are clearly needed.

Therefore, this Court should issue its Writ of Certiorari to further consider this important question.

CONCLUSION

For the foregoing reasons, this Court should issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review that Court's judgment and opinion.

Respectfully submitted,

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[1] The Government had entered into a binding plea bargain with Sargis prior to Saettele's trial. Chappel has never been indicted up to the present time, November 1978.

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 77-1976

United States of America,
Appellee,
v.
James A. Saettele,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: March 14, 1978
Filed: September 13, 1978

Before Lay and Bright, Circuit Judges, and Van Sickle,* District Judge.

Lay, Circuit Judge.

James A. Saettele was convicted in a bench trial on two counts of conspiracy and of knowingly receiving, concealing, storing and selling stolen goods moving in interstate commerce in violation of 18 U.S.C. §§ 371, 2315 (1976).[1] On appeal

* Bruce M. Van Sickle, United States District Judge, District of North Dakota, sitting by designation.

[1] Saettele was sentenced to serve concurrent terms of three years imprisonment on each count.

he contends that his motion for judgment of acquittal should have been granted because the evidence clearly established that he was acting under duress. Saettele also contends that the district court erred in refusing to grant immunity to two defense witnesses whose testimony he claimed would verify his defense of duress. We affirm.

The indictment returned against Saettele alleged that he, in conspiracy with Joseph McGirr and Thomas Sargis, had received and attempted to sell approximately 200 pieces of stolen jewelry. McGirr, testifying under a grant of immunity from prosecution, was the government's key witness at trial. He related that on February 5, 1976, he, Thomas Sargis and Russell Briddle broke into the apartment of a jewelry dealer in Miami Beach, Florida, and stole approximately 200 pieces of jewelry. In an attempt to sell the jewelry the three men went to St. Louis where they were introduced to Saettele by Marshall Chappel, a part-time jeweler and acquaintance of Saettele.

McGirr testified that Saettele liked the jewelry but did not have enough money to purchase it. At a second meeting, however, Saettele informed McGirr, Sargis and Chappel that he thought he could get the money to purchase the jewelry. He gave McGirr and Sargis $4,000 in cash, the title to two automobiles, and a diamond ring, and in return he received bracelets worth about $40,000.

After an unsuccessful trip to Miami for the purpose of borrowing money from another jewelry dealer, Saettele met again with McGirr and Sargis. McGirr stated that at this meeting an agreement was reached in which Saettele would sell the jewelry on consignment. Under the terms of the deal, Saettele would take most of the jewelry for a $10,000 down payment and would pay an additional $40,000 for it as he sold it. McGirr and Sargis returned the car titles and diamond ring to Saettele but kept the $4,000 cash. Saettele apparently

used the car titles to obtain a $6,000 loan, which he gave to McGirr and Sargis to complete the $10,000 down payment. At this point Saettele received substantially all of the jewelry.

Subsequent to the exchange, FBI agents contacted Saettele concerning the stolen jewelry. During the interview, Saettele denied knowing Sargis and McGirr. Afterwards, he located Sargis and returned all the unsold jewelry. The jewelry remained in Sargis' possession until his arrest in St. Louis on June 1, 1976.

At trial Saettele based his defense on his claim that he had been coerced into going along with the fencing operation because of threats made against the lives of himself and his family. He testified that when Marshall Chappel first contacted him about the jewelry, Chappel told him that the jewelry came from a retired jeweler who wanted to sell his collection. When Saettele later met with McGirr and Sargis in March 1976, he began to suspect that the jewelry was stolen and tried to leave. He was stopped by McGirr, who told him the jewelry was "hot" and threatened to kill Saettele and his family if he tried to back out of the transaction or go to the police. Both McGirr and Sargis were armed with guns.

In May 1976, when subpoenaed to testify before the grand jury, Saettele rejected a government offer of immunity and refused to testify on fifth amendment grounds. At trial he explained that he refused the offer of immunity because he feared McGirr and Sargis would harm him or his family if he testified.

Saettele's wife corroborated his story. She testified that when Saettele told her of his involvement, she suggested that he go to the police. She further testified that Saettele replied that he could not because McGirr and Sargis had threatened to kill him and his family if he said anything about the stolen jewelry. The The Government also stipulated that two other witnesses, a friend of Mrs. Saettele's and Mrs. Saettele's mother, would testify that Mrs. Saettele had related to them that McGirr and Sargis had

threatened to kill her husband and the rest of his family if he told anyone about the stolen jewelry.

Saettele also called Thomas Sargis and Marshall Chappel as witnesses on his behalf. Both men were present in the courtroom, Chappel under subpoena and Sargis under a writ of habeas corpus ad testificandum. When Chappel was called to the stand, the prosecutor informed the court that Chappel might refuse to testify on fifth amendment grounds. A bench conference disclosed that the prosecutor had, until the prior evening, been prepared to grant Chappel immunity in order to secure his testimony as a government witness. Although time constraints prevented the prosecutor from obtaining a formal grant of immunity under 18 U.S.C. §§ 6002, 6003 (1976), Chappel agreed to testify if he received a letter from the acting United States attorney declining prosecution. That evening, however, Chappel made statements supporting Saettele's duress contentions. The prosecutor informed Saettele's counsel of these statements, decided not to call Chappel as a witness, and withdrew the offer of immunity.

As anticipated, both Chappel and Sargis asserted their fifth amendment privilege and refused to testify. Saettele made a motion to compel the testimony of the witnesses and asked the court either to grant them immunity or to compel the Government to seek immunity for them. In support of this motion, Saettele introduced a stipulation that an attorney associated with his trial counsel would, if called to the stand, testify that he had interviewed Sargis and Chappel and both had told him that they had threatened Saettele with death if he did not go through with the fencing scheme.

The district court denied Saettele's motion, ruling that it did not have inherent power to grant witnesses immunity when the Government did not apply for it. Saettele thereupon made a motion to strike McGirr's testimony and a motion to dismiss the prosecution because of the unfairness of the government's refusal

to grant immunity to his witnesses. The district court denied both motions and subsequently found Saettele guilty.

Saettele argues that the evidence presented in support of his asserted defense of duress requires a judgment of acquittal. We disagree. In order to successfully raise the defense of duress a defendant in a criminal case must show a reasonable fear of death or serious bodily injury and the absence of a reasonable opportunity to escape or avoid the threatened danger.[2] *United States v. Gordon*, 526 F.2d 406, 407 (9th Cir. 1975). *See United States v. Hearst*, 563 F.2d 1331, 1335 n.1 (9th Cir. 1977), *cert. denied*, 98 S.Ct. 1656 (1978); *United States v. Michelson*, 559 F.2d 567, 569 (9th Cir. 1977); *United States v. Patrick*, 542 F.2d 381, 386 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

Assuming arguendo that the evidence presented was sufficient to establish a reasonable apprehension of injury, nothing in the record suggests that Saettele made any attempt to escape or avoid the threatened danger or was prevented from doing so at any time. In fact Saettele's testimony establishes the opposite.

Saettele testified that he first received the threat in early March 1976. Saettele then testified that the day after receiving the threat he flew alone to Miami. Following his return he informed his wife, who suggested that he go to the police. In addition Saettele stated that after his interview with the FBI, his contacts with McGirr and Sargis were "off and on." In sum nothing in the record supports any claim that the threat of injury was immediate. *See United States v. Patrick*, 542 F.2d

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[2] The classic definition of duress is contained in *Shannon v. United States*, 76 F.2d 490, 493 (10th Cir. 1935):

> Coercion which will excuse the commission of a criminal act must be immediate and of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. One who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrine of coercion. . . .

381, 386-88 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

Our disposition of this issue renders it unnecessary for us to determine whether or not the district court erred in denying Saettele's motions concerning immunity for Sargis and Chappel. Even assuming Sargis and Chappel would have corroborated Saettele's testimony[3] we agree with the district court that "it is clear that defendant had many opportunities to escape and thus, the defense of duress is not available." Saettele's own testimony negates the element of inescapability.

The judgment of conviction is affirmed.

BRIGHT, Circuit Judge, dissenting.

I respectfully dissent. For reasons stated below, I believe this court must consider and accept in part Saettele's contention that he was denied a fair trial because the Government immunized its chief witness but declined to offer immunity to Saettele's witnesses.

The district court stated three grounds for denying Saettele's motions regarding immunity for Sargis and Chappel. The court first asserted that it had no inherent power to grant witnesses immunity from prosecution. In a later memorandum opinion, the court stated that even if it possessed the power, granting immunity in the present case would be inappropriate because (1) immunity from federal prosecution would not necessarily compel the witnesses to testify because thy might still be subject to state prosecution and (2) the testimony of Sargis and Chappel was immaterial because Saettele was not entitled to the defense of duress.

[3] This is a large assumption. Both Sargis and Chappel previously had informed the prosecution that neither Saettele nor his family were threatened or forced to buy any jewelry.

I cannot agree with the majority's conclusion that, as a matter of law, Saettele was not entitled to the defense of duress as a basis for affirming the district court. The district court concluded that Saettele "had many opportunities to escape and, thus, the defense of duress was not available." The district court drew this conclusion, however, before receiving all available evidence on this issue. If the testimony of Chappel and Sargis corroborated Saettele's testimony, it might have bolstered Saettele's credibility and shed more light on the nature and extent of the alleged duress. On the present state of the record we have no way of knowing whether the witnesses' testimony would have supported Satetelle's duress claim. Because the district court prematurely concluded that the defense was not available, that conclusion constituted an insufficient basis for rejecting the testimony of Chappel and Sargis and is, in my opinion, an improper basis for an affirmance by this court.

The district court also stated that the possibility of state prosecution might deter Chappel and Sargis from testifying even if immunity were granted. I disagree with this hypothesis. Immunity granted by a federal court extends to state as well as federal prosecutions. *See Kastigar v. United States*, 406 U.S. 441, 456-59 (1972); *Murphy v. Waterfront Commission*, 378 U.S. 52, 78-79 (1964); *United States v. Watkins*, 505 F.2d 545 (7th Cir. 1974); *United States v. Armstrong*, 476 F.2d 313 (5th Cir. 1973). Therefore, Sargis and Chappel, upon being granted immunity, could not use fear of state prosecution as a basis for invoking their fifth amendment privilege.

The district court's final basis for denying Saettele's motion—that it lacked the power to grant immunity or to compel the prosecution to do so—presents greater difficulty, for it raises important questions of conflicting constitutional rights and responsibilities.

The compulsory process clause of the sixth amendment guarantees a defendant's right to secure the testimony of witnesses

on his or her behalf, a right that plays a fundamental role in our system of criminal justice. The Supreme Court recently emphasized the importance of the compulsory process clause in *United States v. Nixon*, 418 U.S. 683, 709 (1974):

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

The compulsory process clause assures not only the right to compel the attendance of witnesses but also the right to secure their testimony:

> [T]he petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use. [*Washington v. Texas*, 388 U.S. 14, 23 (1967) (footnote omitted).]

See Westen, *The Compulsory Process Clause*, 73 Mich. L.Rev. 71 (1974).

A defendant doeos not, however, have an absolute right to compel testimony, for a witness may refuse to testify on the

ground that the testimony may be incriminating. The fifth amendment right against compulsory self-incrimination "reflects * * * our fundamental values and aspirations, and marks an important advance in the development of our liberty." *Kastigar v. United States, supra*, 406 U.S. at 444 (footnote omitted); *accord, Murphy v. Waterfront Commission, supra*, 378 U.S. at 55 (1964); *Ullman v. United States*, 350 U.S. 422, 426 (1956).

The conflict between these two essential rights has led to the enactment of statutes empowering prosecutors to afford immunity to witnesses who invoke their fifth amendment rights. Such statutes "seek a rational accommodation between the imperatives of the [fifth amendment] privilege and the legitimate demands of government to compel citizens to testify." *Kastigar v. United States, supra*, 406 U.S. at 446. At issue in the present case are the immunity provisions of 18 U.S.C. §§ 6002, 6003 (1976).[4] Under section 6002, a witness may be compelled to

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[4] Section 6002 provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Section 6003 provides:

> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand

testify by granting "use immunity," *i.e.*, no testimony given under the grant of immunity may be used against the witness in a criminal case. Section 6003 provides the procedure to follow in seeking immunity. The United States attorney, upon determining that the testimony is necessary to the public interest, must first obtain the approval of the Attorney General and then must seek a court order compelling the witness to testify, subject to the immunity provisions of section 6002. The court's power is limited: "The court's role in granting the order is merely to find the facts on which the order is predicated." H.R. Rep. No. 91-1549, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 4007, 4018.

Because the authority to seek immunity under section 6002 can be exercised only by the *prosecutor*, the statute does not always achieve its purpose of accommodating the conflicting rights of the *defendant* and the witness. Such is the case before us. Under the circumstances of this case, I believe the constitutional demands of a fair trial required the prosecutor to grant immunity to the defense witnesses or the district court to take steps to rectify the unfairness created by the Government's one-sided grant of immunity only to its own witnesses.

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jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

The very essence of the due process clause of the fifth amendment, as well as the sixth amendment in its entirety, is the assurance of a fair trial for criminal defendants. The importance of this requirement cannot be overstated, for

> [s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. [*Brady v. Maryland*, 373 U.S. 83, 87 (1963).]

Courts have repeatedly held that government suppression of evidence favorable to the defendant violates the defendant's right to due process. In *Roviaro v. United States*, 353 U.S. 53 (1957), the Supreme Court concluded that the trial court erred in permitting the Government to withhold the identity of an informant who would have been the defendant's sole material witness. The Court noted that the scope of the Government's privilege to withhold the identity of informants is limited by "the fundamental requirements of fairness" and the defendant's "right to prepare his defense." *Id.* at 60, 62. The Court remanded for further proceedings. In *Brady v. Maryland*, *supra*, 373 U.S. at 87, the Court held that a prosecutor must disclose evidence favorable to the defendant; failure to do so, even in good faith, violates the requirements of due process. The Court remanded for retrial. The Third Circuit reached a similar conclusion in *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3d Cir. 1952). The court affirmed the grant of a writ of habeas corpus on the ground that "suppression of evidence favorable to Almeida was a denial of due process." *Id.* at 820.

A refusal to offer immunity to defense witnesses may amount to suppression of exculpatory evidence under some circumstances. Only the Third Circuit has ordered a grant of immunity in such a case. In *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976), the prosecutor had intimidated the defendant's primary witness to the point where she invoked her fifth amendment privilege. The court held that the prose-

cutor's actions violated the defendant's right to due process. It ordered that upon retrial the Government must either request immunity for the witness or the trial court must enter a judgment of acquittal. Three other circuit courts, while holding that the trial court lacked the power to grant immunity to defense witnesses under the circumstances before them, have speculated that under different circumstances such a power might exist. In *Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966), the District of Columbia Circuit refused to order immunity for a defense witness. Judge (now Chief Justice) Burger, writing for the court, contrasted the circumstances with those existing in *Brady* and noted that the Government had not suppressed any evidence. In a footnote, however, he suggested that immunity may be required if the Government had granted immunity to its own witnesses:

> We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. [*Id.* at 534 n.1 (emphasis in original).]

In a statement upon denial of a petition for rehearing *en banc* in the same case, Judge Leventhal also expressed a concern that the principles underlying *Brady* should be applied to immunity question. *Earl v. United States*, 364 F.2d 666 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967). Chief Judge Bazelon of the same court has suggested that the trial court may be able to condition the introduction of government evidence on the Government's agreement to grant immunity to defense witnesses. *United States v. Leonard*, 494 F.2d 955, 985 n. 79 (D.C. Cir. 1974) (Bazelon, C.J., concurring in part and dissenting in part). *See also United States v. Gaither*, 539 F.2d 753 (D.C. Cir.), *cert. denied*, 429 U.S. 961 (1976) (statement of Bazelon, C.J., upon denial of petition for rehearing *en banc*). The Seventh Circuit in *United States v. Allstate Mortgage Corp.*, 507 F.2d 492 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975), held that a defendant has no constitutional right to have immunity conferred upon witnesses who exercise their fifth amendment privilege; yet it expressly contrasted the case with a situation in which the Government secures evidence by means of grants of immunity. In *United States v. Alessio*, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976), the court refused to compel the Government to grant immunity to defense witnesses. The court noted that the "key question" was whether the defendant "was denied a fair trial because of the government's refusal to seek immunity for defense witnesses," but it concluded that the defendant was not denied a fair trial because the proffered evidence was merely cumulative. *Id.* at 1082.

In the present case, the Government refused to grant immunity to Chappel and Sargis, thereby placing their testimony out of Saettele's reach. These were the only witnesses who might have rebutted McGirr's testimony and corroborated Saettele's own story. The Government presented no affirmative reason for refusing immunity to these two witnesses.[5] In fact,

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[5] One possible reason is that the Government would sacrifice the opportunity to prosecute Sargis and Chappel. Saettele argues in his brief that the Government had already decided not to do so. Whether this assertion is true or not, the Government would lose little by granting use immunity. As one commentator has noted:

> *Kastigar's* analysis applies with equal force to the grant of use immunity to defense witnesses. *The prosecution surrenders nothing by granting it: The incriminating statements that it cannot use against the immunized witness are statements that, absent immunity, would never have been made.* The prosecution can hardly complain about immunizing defense witnesses because, as the Supreme Court said, the prosecution is in *substantially the same position* with respect to a witness after granting him immunity as before. [Westen, *The Compulsory Process Clause*, 73 Mich. L.Rev. 71, 169 (1974) (emphasis added).

Here, Sargis and Chappel apparently told their story at least in part prior to trial but had made no incriminating statements under oath. The Government could, of course, use information obtained prior to the grant of immunity.

the prosecutor had already offered immunity to Chappel but withdrew the offer when it appeared that Chappel's testimony would support Saettele's defense. Thus, the Government utilized its immunity-granting power to obtain McGirr's crucial testimony and to make its case against Saettele, but it denied Saettele the benefit of that power and, as a result, the opportunity to obtain offsetting testimony. The principles enunciated in *Roviaro* and *Brady*, *supra*, should be extended to the particular circumstances present in this case, for the prosecution's conduct amounted to the withholding of evidence favorable to Saettele and served to deprive him of a fair trial.

As noted above, the power to seek a grant of immunity under federal law rests with the United States attorney, not the trial court. The trial court, however, possesses an inherent power to regulate the introduction of evidence and to assure the integrity and fairness of the judicial process. Under the narrow circumstances disclosed in this record, the trial court possessed the power to condition its consideration of McGirr's testimony upon the granting of immunity to Sargis and Chappel.

Accordingly, I would vacate the judgment of conviction and remand for further proceedings.[6]

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[6] The case need not be retried in its entirety on the theory of this dissent. The district court could allow Saettele to reopen his defense and should allow the Government an opportunity to grant immunity to Sargis and Chappel. If the Government chooses not to do so, the district court could grant Saettele's motion to strike McGirr's testimony or his motion to dismiss the prosecution.

APPENDIX B

United States Court of Appeals
for the Eighth Circuit

77-1976 September Term, 1978

United States of America, Appellee,

vs.

James A. Saettele, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

October 2, 1978

APPENDIX C

Supreme Court of the Unit[illegible]d States

No. A-330

James A. Saettele,
Petitioner,

v.

United States

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 1, 1978.

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme
Court of the United States

Dated this 11th day of October, 1978

APPENDIX D

Federal Constitutional Provisions and Statutes Involved

Amendments V and VI to the Constitution of the United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Sections 6001, 6002, 6003, Title 18 United States Code, 84 Stat. 926; 84 Stat. 927; 84 Stat. 927.

§ 6001. Definitions

As used in this part—

(1) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpenas and take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Customs Court, and the Court of Military Appeals.

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

APPENDIX E

Transcript of Stipulation of Testimony Regarding Statements of Witnesses Chappell and Sargis

MR. LONDON: Your Honor, in an effort of expediency it is my understanding that Mr. Jenkins would stipulate that if Mr. Fleming were called to testify in this case on behalf of this motion, the case in general, that he would testify that he interviewed Tommy Sargis on the 2nd day of September, 1977, at the United States Marshal's Office in this building, and that Mr. Sargis stated to Mr. Fleming, and he would testify that he so stated, that Sargis stated that if he testifies under a grant of immunity that he will testify under said grant and that his testimony would include the fact that he and McGirr did threaten Saettele's life.

Sargis further stated to Mr. Fleming and Mr. Fleming would state and testify that Sargis said, "We knew we were dealing with a square and wanted to put the fear of God in him."

Sargis stated to Mr. Fleming that although he has no specific recollection about threats on Saettele's life, and he has no specific recollection about threats that involved an individual that Sargis supposedly beat up who had told Sargis he was sorry, he stated, however, that although he had no specific recollection of those events in his conversations with Saettele that he might well have said them and might well have said anything along this line since it was clearly his intent to frighten Saettele, and that these conversations with Saettele took place during the time of the negotiations concerning this jewelry.

MR. JENKINS: Mr. Fleming has indicated to me that this would be his sworn testimony and I agree that if he were called that would be his testimony.

MR. LONDON: I believe a similar stipulation may be entered into with regard to Mr. Chappel, that Mr. Fleming, if called as a witness, would state that he interviewed Mr. Chappel on the 13th day of September 1977, in the office of Mr. Chappel's attorney. Chappel stated to Fleming and Fleming would testify that Sargis had asked Chappel to try and find a buyer for a large amount of jewelry. Sargis indicated that McGirr was a partner of his in connection with the sale of the jewelry, but did not indicate to Chappel that the jewelry was stolen. Chappel stated to Fleming and Fleming would testify that Chappel took Saettele to Sargis' home to view the jewelry and that Chappel does not remember anyone saying at that time anything about the jewelry was stolen.

Chappel stated to Fleming that at the second meeting and during each of the subsequent meetings of Saettele with McGirr and Sargis that both Sargis and McGirr threatened Saettele and indicated that they would harm his wife and his family as well as himself if he did not cooperate with them.

Chappel stated that he recalls McGirr saying that he did not want to hear Saettele say he was sorry, and he recalled an incident of any individual who told McGirr that he was sorry all the time McGirr was beating him.

Chappel stated to Fleming that the threats became more frequent and pronounced as time went on and that Saettele was unable to come up with money for McGirr and Sargis.

Chappel stated to Fleming that he recalled an incident when McGirr became very incesed (sic) because Chappel's wife was present at Sargis' home and that he threw some jewelry on the floor, breaking a number of items.

Chappel further stated that he described Saettele as being afraid and testified he described McGirr as a wild man and he believes that Saettele had reason to fear him.

MR. JENKINS: Again, your Honor, Mr. Fleming has indicated to the government that would be his sworn testimony if called as a witness and I would stipulate that that would be his testimony.

THE COURT: Do you have any objection to the admissibility of Mr. Fleming's testimony?

MR. JENKINS: With regard to the motions which, as I understand it, is why it is being offered and not as defense in chief, I have no objection."

* * * * * * *

No. 78-835

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES A. SAETTELE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 585 F.2d 307.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1978. A petition for rehearing (Pet. App. B) was denied on October 2, 1978. On October 11, 1978, Mr. Justice Blackmun extended

the time for filing a petition for a writ of certiorari to December 1, 1978. The petition was filed on November 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's refusal to order the government to grant immunity to two defense witnesses denied petitioner a fair trial.

STATEMENT

Following a jury-waived trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of receiving and selling stolen property moving in interstate commerce, in violation of 18 U.S.C. 2315, and of conspiring to commit that offense, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals affirmed, one judge dissenting (Pet. App. A-1 to A-14).

The evidence at trial showed that in February 1976 Joseph McGirr, Thomas Sargis, and Russell Briddle broke into the apartment of a jewelry dealer in Miami Beach, Florida, and stole approximately 300 pieces of jewelry, including a five-piece set of Russian jewelry valued at $500,000 (Tr. 13-19, 106-107).[1] In an

[1] Joseph McGirr, who testified under a grant of immunity, was the government's chief witness at trial. The government called three FBI agents and the dealer from whom the jewelry was stolen to corroborate McGirr's testimony.

attempt to sell the jewelry, the three men went to St. Louis, where they were introduced to petitioner, a jeweler, by Marshall Chappel, a part-time jeweler and an acquaintance of petitioner's (Tr. 27).

Petitioner expressed an interest in buying the jewelry but stated that he did not have enough money to buy it at that time (Tr. 28). At a second meeting, petitioner told the thieves that he had a friend who might lend him the money to buy the jewelry. He asked to take some of the jewelry to Miami to show his friend, but McGirr replied that that might be a problem because Miami was the city where the jewelry had been stolen. At that meeting, McGirr and Sargis gave petitioner several bracelets, worth approximately $40,000, in exchange for $4,000 in cash, two automobile titles, and a diamond ring (Tr. 29-30).

After petitioner returned from Miami without having obtained the loan, it was agreed that he would sell the jewelry on consignment. McGirr and Sargis returned the car titles and the diamond ring, and, as a down payment, petitioner gave them $6,000 in addition to the $4,000 he had previously paid them. In return, petitioner received most of the jewelry and agreed to pay the thieves an additional $40,000 as he sold it. Once the $40,000 was paid, petitioner was to be given access to the remaining jewelry—the Russian set and two blue diamonds (Tr. 31-33). Before McGirr was arrested in April 1976 for a parole violation, he had received about $1,000 from petitioner for the sale of some of the jewelry (Tr. 37-38).

On April 22, 1976, FBI agents interviewed petitioner and questioned him about the stolen jewelry (Tr. 85-86). Petitioner denied knowing McGirr or Sargis and said he had never been to Sargis's residence. McGirr had previously told the FBI that several meetings between petitioner, Sargis, and himself had taken place at Sargis's residence, and FBI agents had seen petitioner there while they were surveilling the house (Tr. 87-88, 76-77, 82). In May 1976 petitioner was called to testify before the grand jury, but he refused to testify and rejected an offer of immunity (Tr. 170). The next month, FBI agents arrested Sargis and seized the unsold jewelry from him (Tr. 91-92, 167).

Petitioner testified in his own behalf. He admitted being involved in the fencing operation, but he claimed that his involvement had been coerced. He testified that Chappel had told him the jewelry belonged to a retired dealer who wanted to sell his collection. He admitted, however, that he had never asked who the retired jeweler was, nor had he ever asked to see a bill of sale or consignment memorandum, despite the unusual size and value of the collection (Tr. 176-177; 181-183). Petitioner claimed that when he later became suspicious that the jewelry was stolen, he tried to back out of the deal, but that McGirr and Sargis threatened to kill him and his family if he did not cooperate or if he tried to go to the police (Tr. 156-160). He explained that his refusal to testify before the grand jury was also based on his fear of harm to himself and his family (Tr. 170).

Petitioner's wife corroborated his story (Tr. 213), and it was stipulated that two other witnesses would testify that petitioner's wife had told them that petitioner was in trouble with respect to some stolen jewelry and that threats had been made on his life and the lives of members of his family (Tr. 219-220).

The defense also called Marshall Chappel and Thomas Sargis to testify in support of petitioner's claim of duress, but both asserted the privilege against compulsory self-incrimination and refused to testify (Tr. 119-122, 125-129).[2] Petitioner then moved to have the court grant immunity to both Chappel and Sargis to compel their testimony as defense witnesses. In support of that motion, petitioner offered stipulations as to statements given to defense counsel by Chappel and Sargis to the effect they had threatened petitioner during the time of the negotiations over the jewelry and when petitioner was unable to pay McGirr and Sargis money that he owed them (Pet. App. A-21 to A-23; Tr. 131a-134). It was also stipulated that in previous interviews with the Assistant United States Attorney, both Chappel and Sargis had stated that petitioner was a knowing and willing participant in the scheme and that the threats that

[2] Chappel appeared in response to a subpoena. Sargis was produced pursuant to a writ of habeas corpus *ad testificandum*. Sargis had earlier pleaded guilty to one count of conspiracy; Chappel had not been prosecuted. In view of Sargis' exposure to other charges and Chappel's incriminating statements before the grand jury, the district court found that their invocation of the privilege against compulsory self-incrimination was proper (Tr. 130).

were made to petitioner came only after petitioner fell behind in making payments on the jewelry (Tr. 138-142). The government also offered, in opposition to the defense motion, transcripts of Chappel's grand jury testimony and of statements made by Chappel and Sargis to the FBI (Tr. 135, 145).

The immunity motion was denied by the district court, as were requests to strike McGirr's testimony and to dismiss the case because of the alleged unfairness of the government's refusal to grant immunity to the two witnesses (Tr. 148-153). In a post-trial memorandum opinion, the district court found petitioner guilty and held that he was not entitled to have the government grant immunity to Sargis and Chappel because, *inter alia*, the defense proffer itself showed that their testimony would not have supported a defense of duress (Pet. App. A-6).

The court of appeals agreed with the district court that "[e]ven assuming Sargis and Chappel would have corroborated [petitioner's] testimony, * * * 'it is clear that [petitioner] had many opportunities to escape and thus, the defense of duress is not available.' [Petitioner's] own testimony negates the element of inescapability" (Pet. App. A-6). The court of appeals therefore held that it was unnecessary to determine whether the district court otherwise should have granted petitioner's motions concerning immunity for Sargis and Chappel (*ibid.*). Judge Bright dissented (Pet. App. A-6 to A-14). In his view, the district court should not have concluded that the defense of duress was unavailable without hearing the testimony of Sargis and Chappel. Instead, he concluded, the district court should have conditioned its consideration of McGirr's testimony upon the granting of immunity to Sargis and Chappel (Pet. App. A-14).

ARGUMENT

1. Petitioner contends (Pet. 8-16) that due process requires the government to grant immunity to essential defense witnesses when it is necessary to compel their testimony, at least when the government has immunized its chief witness.[3] The court of appeals, in affirming petitioner's conviction, found it unnecessary to reach this question because it agreed with the district court that, even if Chappel and Sargis would have corroborated petitioner's claim of coercion, their testimony, together with the other evidence, would not have sufficed to support a defense of duress (Pet. App. A-5 to A-6).

The classic and often-cited definition of duress as a defense to criminal liability appears in *Shannon* v. *United States*, 76 F.2d 490, 493 (10th Cir. 1935):

> Coercion which will excuse the commission of a criminal act must be immediate and of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. One who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrine of coercion and is not entitled to an instruction submitting that question to the jury.

[3] Petitioner also contends that the government's refusal to immunize essential defense witnesses violates the Compulsory Process Clause (Pet. 11) and the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963) (Pet. 16-19).

Thus, fear alone, even fear for one's life, is not enough to excuse the commission of a crime. *United States* v. *Housand*, 550 F.2d 818, 825 (2d Cir.), cert. denied, 431 U.S. 970 (1977); *United States* v. *Patrick*, 542 F.2d 381, 388 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977); see *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961). Courts have consistently held that in order to establish the defense of duress, the defendant must show not only that he had a reasonably grounded fear of death or serious bodily injury, but also that the danger was immediate and inescapable. *United States* v. *Housand*, *supra*, 550 F.2d at 824-825; *United States* v. *Patrick*, *supra*, 542 F.2d at 386-387; *United States* v. *McClain*, 531 F.2d 431, 438 (9th Cir.), cert. denied, 429 U.S. 835 (1976); *United States* v. *Gordon*, 526 F.2d 406, 407 (9th Cir. 1975); see also *United States* v. *Hearst*, 563 F.2d 1331 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978); *United States* v. *Smith*, 532 F.2d 158, 161 (10th Cir. 1976). Failure to adduce evidence to support each of these elements may properly result in rejection of proffered testimony (*United States* v. *Gordon*, *supra*, 526 F.2d at 407-408) or in refusal to instruct on duress in a jury case (*United States* v. *Patrick*, *supra*, 542 F.2d at 386, 388).

In the instant case, neither petitioner's testimony nor the proffered testimony of Sargis and Chappel indicated either that the threat of injury was immediate or that the danger was inescapable. Rather, as the court of appeals noted, petitioner's own testimony negated the element of inescapability (Pet.

App. A-5 to A-6). He testified that after receiving the threat he flew alone to Miami. Upon his return, he told his wife about the threats. She became very angry with him and told him to go to the police (Tr. 162-163, 165-166). Yet from March until September 1976, petitioner made no attempt to go to the authorities, even though by his own account his contacts with McGirr and Sargis became "off and on" (Tr. 165, 169). Accordingly, it was clear from petitioner's testimony that he had failed to take "the reasonable steps available in an attempt to extricate himself from the apparent danger." *United States* v. *Patrick*, *supra*, 542 F.2d at 388.

Contrary to the view of the dissenting judge (Pet. App. A-7), the district court did not err in concluding that the defense of duress was unavailable without hearing the testimony of Chappel and Sargis. The proffer of their testimony by defense counsel indicated that, at best, they would do no more than corroborate petitioner's account of the threats. Because petitioner's testimony did not establish essential elements of the defense of duress, it was unnecessary for the court to force the government to immunize Sargis and Chappel so that it could hear their testimony, which, even according to petitioner's proffer, would not have supported a defense of duress.

2. Moreover, the power of the Executive Branch to grant immunity to a witness is discretionary; there is no obligation on the part of the United States Attorney to seek immunity, and the court is powerless

to provide immunity on its own motion. See, *e.g.*, *United States* v. *Lang*, No. 78-1205 (2d Cir. Nov. 30, 1978); *United States* v. *Herman*, No. 78-1252 (3d Cir. Nov. 17, 1978); *United States* v. *Rocco*, No. 78-1356 (3d Cir., Nov. 14, 1978); *United States* v. *Benveniste*, 564 F.2d 335, 339 n.4 (9th Cir. 1977); *United States* v. *Housand*, *supra*, 550 F.2d at 824; *In re Daley*, 549 F.2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *United States* v. *Ramsey*, 503 F.2d 524, 532-533 (7th Cir. 1974), cert. denied, 420 U.S. 932 (1975); *Earl* v. *United States*, 361 F.2d 531, 534 (D.C. Cir. 1966), cert. denied, 388 U.S. 921-922 (1967). As the court explained in *United States* v. *Alessio*, *supra*, 528 F.2d at 1082: "To interpret the Fifth and Sixth Amendments as conferring on the defendant the power to demand immunity for co-defendants, potential co-defendants, or others whom the government might in its discretion wish to prosecute would unacceptably alter the historic role of the Executive Branch in criminal prosecutions."

In only one reported case has a court held that the government might be required to grant immunity to a defense witness as a precondition to proceeding with the trial. Contrary to petitioner's assertion (Pet. 13), that case, *United States* v. *Morrison*, 535 F.2d 223 (3d Cir.), cert. denied, 429 U.S. 824 (1976), is quite different from the case at bar. In *Morrison*, the court found that an otherwise willing defense witness was

driven by prosecutorial misconduct to invoke her Fifth Amendment privilege. Relying on *Webb* v. *Texas*, 409 U.S. 95 (1972), the court reversed the conviction, finding that the defendant's right to present witnesses had been denied by the prosecutor's "bizarre conduct." See 535 F.2d at 226-228. In order to guarantee that the harm done by the prosecutor was not irreparable, the court of appeals held that the government on remand must request use immunity for the witness if she refused to testify and that in the absence of such a request, the district court should enter a judgment of acquittal. See 535 F.2d at 229.

The district court was correct in observing (Tr. 149) that the situation in this case does not resemble that of *Morrison*. There is no suggestion of prosecutorial misconduct in this case. Nor is there any suggestion in cases decided after *Morrison* that the Third Circuit meant to mark a departure in that case from the settled rule that the question whether to grant immunity to potential witnesses is ordinarily left to the prosecutor's discretion. In later cases, the Third Circuit has made it clear that the prosecutorial misconduct in *Morrison* constituted a special circumstance that made relief appropriate in that case, but that similar relief would not be appropriate absent such misconduct. *United States* v. *Herman*, *supra*, slip op. 13-14; *United States* v. *Rocco*, *supra*, slip op. 6 n.10; *United States* v. *Niederberger*, 580 F.2d 63, 67 (3d Cir. 1978).

Petitioner contends (Pet. 13-15) that because the government had immunized one of its own witnesses but refused to immunize Sargis and Chappel so that they could testify for the defense, he was denied due process of law. In support of this contention, petitioner relies primarily on a footnote from an opinion of the Court of Appeals for the District of Columbia Circuit, *Earl* v. *United States*, *supra*. In that footnote, the court of appeals speculated that "[w]e might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for [defendant's witness]" (361 F.2d at 534 n.1).[4]

As the court observed in *United States* v. *Alessio*, *supra*, the footnote observation of the court of appeals in *Earl* does not suggest that the government incurs an obligation to immunize defense witnesses whenever it relies on immunized testimony; rather, it means only that "whatever power the government possesses may not be exercised in a manner which denies the defendant the due process guaranteed by the Fifth Amendment." 528 F.2d at 1082. Thus, whether a

[4] Other cases cited by petitioner in support of this contention make no comment on it; they merely note that since the government was not relying on immunized testimony, the problem was not presented. See *United States* v. *Allstate Mortgage Corp.*, 507 F.2d 492, 495 (7th Cir. 1974), cert. denied, 421 U.S. 999 (1975); *United States* v. *Ramsey*, 503 F.2d 524, 532-533 (7th Cir. 1974); cert. denied, 420 U.S. 932 (1975). See also *United States* v. *Lang*, *supra*, slip op. 463; *United States* v. *Jenkins*, 470 F.2d 1061, 1063-1064 (9th Cir. 1972), cert. denied, 411 U.S. 920 (1973).

defendant has been denied a fair trial depends on the specific circumstances of a particular case. In *Alessio*, for example, despite the fact that the government had granted immunity for one of its witnesses and refused to seek immunity for defense witnesses, the court found no evidence that the defendant had been denied a fair trial, since the testimony sought by the defense would have been merely cumulative of other testimony. *Ibid.*

The facts of the instant case similarly show that petitioner was not denied a fair trial. As we discussed above, petitioner's own testimony had already negated an essential element of his only defense. Thus, the testimony of Chappel and Sargis, even if it corroborated petitioner's testimony, would not have aided him. Indeed, the district court, which sat as the trier of fact, was told essentially what defense counsel expected Chappel and Sargis to say if they were compelled to testify, and the court observed that, even assuming the credibility of their testimony, it did not appear that it would be greatly supportive of petitioner (Tr. 151-152).[5] In sum, even accepting the

[5] Petitioner's argument that the government's refusal to request immunity for defense witnesses was a violation of its duty under *Brady* v. *Maryland*, *supra*, to provide the defense with exculpatory evidence is also without merit. There was absolutely no suppression of favorable evidence in this case. On the contrary, the prosecutor promptly notified defense counsel as soon as it appeared that Chappel might be changing his story to a version more supportive of petitioner (Tr. 114). Moreover, the government made sure that both Chappel and Sargis were present and available to testify. See note 2, *supra*. The witnesses' refusal to testify did not result from any inter-

suggestion in *Earl* that there may be circumstances in which a refusal to immunize a prospective defense witness would deprive the defendant of a fair trial, this is not such a case, and it therefore affords this Court no opportunity to pass upon the issue in any useful way.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ference on the part of the prosecutor. In such circumstances, to require further that the government *compel* the giving of favorable testimony would be an unwarranted extension of the holding in *Brady*. *Earl* v. *United States*, *supra*, 361 F.2d at 534.

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